

IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 16-1779
LINN COUNTY CASE NO. LACV82466

NOLAN DEEDS,
Plaintiff-Appellant,

v.

CITY OF CEDAR RAPIDS, ST. LUKE'S WORK WELL
SOLUTIONS, ST. LUKE'S HEALTHCARE, AND IOWA
HEALTH SYSTEM d/b/a UNITY POINT HEALTH
Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF LINN
COUNTY
NO. LACV82466
HON. PAUL D. MILLER, JUDGE

**FINAL BRIEF OF DEFENDANT-APPELLEE
CITY OF CEDAR RAPIDS**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES PRESENTED FOR REVIEW	1
ROUTING STATEMENT.....	3
STATEMENT OF THE CASE.....	3
STATEMENT OF FACTS	5
ARGUMENT	15
CONCLUSION.....	35
REQUEST FOR NONORAL SUBMISSION.....	35
ATTORNEY’S COST CERTIFICATE.....	37
CERTIFICATE OF COMPLIANCE	38
CERTIFICATE OF FILING.....	39
CERTIFICATE OF SERVICE	39

TABLE OF AUTHORITIES

CASES

<i>Annear v. State</i> , 454 N.W.2d 869 (N.D. Iowa 1995).....	19
<i>Bates v. Dura Auto Sys., Inc.</i> , 767 F.3d 566 (6 th Cir 2014)	33
<i>Boelman v. Manson State Park</i> , 522 N.W.2d 73 (Iowa 1994)	19
<i>EEOC v. American Tool & Mold Inc.</i> , 21 F.Supp. 3d 1268 (M.D. Fla. 2014)	33
<i>Estate of Harris v. Papa John's Pizza</i> , 679 N.W.2d 673 (Iowa 2004).....	18
<i>Fuller v. Iowa Dep't of Human Servs.</i> , 576 N.W.2d 324 (Iowa 1998).....	17
<i>Garrison v. Baker Hughes Oilfield Operations, Inc.</i> , 287 F.3d 955 (10th Cir. 2002)	31
<i>Goodpaster v. Schwan's Home Serv., Inc.</i> 849 NW.2d 1 (Iowa 2014).....	22
<i>Hansen v. Seabee, Corp.</i> , 688 N.W.2d 234 (Iowa 2004)	16
<i>Holiday v. City of Chattanooga</i> , 206 F. 3d 637 (6 th Cir. 2000).....	31
<i>Huisinga v. Federal-Mogul Ignition, Co.</i> 519 F. Supp. 2d 929 (S.D. Iowa 2007)	22, 32
<i>Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n</i> , 453 N.W.2d 512 (Iowa 1990)	17
<i>International Brotherhood of Teamsters v. United States</i> , 431 U.S. 324 (1997).....	18
<i>Jackson v. Bossard IIP, Inc.</i> , 725 N.W.2d 658 (Iowa 2006).....	26
<i>Kimbrow v. Atlantic Richfield Co.</i> , 889 F.2d 869 (9th Cir. 1989)	32
<i>Kincaid v. City of Omaha</i> , 378 F.3d 799 (8th Cir. 2004)	16
<i>Kolarik v. Cory Intern. Corp.</i> , 721 N.W.2d 159 (Iowa 2006).....	18
<i>Meier v. Family Dollar Servs.</i> , 443 F. Supp. 2d 1036 (N.D. Iowa 2006)	17
<i>Peterson v. Martin Marietta Materials, Inc.</i> , 2016 U.S. Dist. LEXIS 64469 (N.D. Iowa May 17, 2016).....	16
<i>Raytheon Co. v. Hernandez</i> , 540 U.S. 44 (2003).....	23
<i>Roberts v. City of Chicago</i> , 817 F.3d 561 (7th Cir. 2016).....	26, 27
<i>Sahai v. Davies</i> , 557 N.W. 2d 898 (Iowa 1997)	5, 31
<i>Smith v. Creston Mun. Utils./Water Dept.</i> , No. 0-581 / 10-0181, 2010 Iowa App. LEXIS 1419, at *1-16 (Iowa Ct. App. Nov. 24, 2010)	26
<i>Torlowei v. Target</i> , 401 F. 3d 933 (8 th Cir. 2005)	18

<i>Tusing v. Des Moines Indep. Cmty. Sch. Dist.</i> , 639 F.3d 507 (8th Cir. Iowa 2011)	25
<i>Wirey v. Richland Comm. College</i> , 913 F.Supp. 2d 633 (C.D. Ill. 2012)	32
<i>Wyngarden v. State Judicial Branch</i> , 856 N.W.2d 2 (Iowa App. 2014)	18

OTHER AUTHORITIES

Americans with Disabilities Act, 42 U.S.C.S. § 12101 et seq.....	17
Iowa Code §216.6	3, 15, 16, 17, 18, 20, 22, 27
Iowa Code §216.6(1)(a)	16
Iowa Code §400.8	33
Iowa Code §400.8A	33

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. WHETHER THE DISTRICT COURT ERRED IN HOLDING THAT THE CITY'S DECISION TO RESCIND PLAINTIFF'S EMPLOYMENT OFFER WAS NOT MOTIVATED BY HIS DISABILITY

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Wynngarden v. State Judicial Branch, 856 N.W.2d 2 (Iowa App. 2014)

OTHER AUTHORITIES

Americans with Disabilities Act, 42 U.S.C.S. § 12101 et seq.

Iowa Code §216.6

Iowa Code §216.6(1)(a)

Iowa Code §400.8

Iowa Code §400.8A

II. WHETHER THE DISTRICT COURT ERRED IN FINDING THE UNITY POINT DEFENDANTS DID NOT AID AND ABET DISABILTY DISCRIMINATION

No cases or other authority were included.

ROUTING STATEMENT

This case involves the application of existing legal principles and in accordance with Iowa R. App. 6.1101(3)(a), should be transferred to the Iowa Court of Appeals.

STATEMENT OF THE CASE

Nature of the Case

This case involves claims by Appellant Nolan Deeds (“Deeds”) under Iowa Code Chapter 216, the Iowa Civil Rights Act (“ICRA”). Deeds claims the Appellee City of Cedar Rapids (“the City”) unlawfully discriminated against him on the basis of disability with respect to allegedly adverse employment actions. Deeds also claims the Appellees St. Luke’s Work Well Solutions, St. Luke’s Healthcare, and Iowa Health System d/b/a Unity Point Health, (collectively “UP”) aided and abetted in discriminating against him.

Prior Proceedings and Disposition in District Court

In his single count petition, Deeds claimed the City violated ICRA when it rescinded a conditional job offer due to the fact that an occupational health physician for Appellee St. Luke’s Work Well Solutions (“Work Well”), Dr. Jeffrey Westpheling, determined Deeds was not medically qualified to perform the essential functions for the job of firefighter with the City. As filed, Deeds’ petition alleged that the City failed to: hire him in violation of

ICRA; provide an individualized assessment of his ability to perform the essential job functions of a firefighter; make reasonable accommodations for his disability; and engage in good faith in the interactive process for accommodating a disability.¹ Although Deeds never amended his petition, he subsequently represented to the Court, (in resisting summary judgment), his only claim against the City was that he was denied employment because of his disability. In its answer, the City denied all claims, contending it did not rescind the offer because of a disability and its decision was not motivated by disability. In addition, the City contended Deeds did not have a qualifying disability within the meaning of ICRA, and he was not qualified to perform the essential job functions of firefighter because at that time, he could not obtain medical clearance to perform the essential job functions and employing him would have created a direct threat to his and others' health and safety during an emergency response.

The City filed a Motion for Summary Judgment, along with a supporting Statement of Undisputed Material Facts, Appendix thereto and a Memorandum in Support of Authorities. The City contended that when viewed in the light most favorable to Deeds, the undisputed material facts entitled the City to judgment as a matter of law because Deeds could not

¹ Deeds filed a similar petition against the City of Marion and UP, which was also dismissed on summary judgment and is now on appeal as Supreme Court No. 16-1666 (Linn County No. LACV082464).

establish the requisite elements of his claims. UP filed a separate Motion for Summary Judgment and supporting documents. Following Deeds' resistance to both Motions, all parties agreed that the motions could be decided without hearing. The Honorable District Court Judge Paul Miller issued his ruling September 21, 2016, granting both motions for summary judgment and dismissing the case in its entirety. In ruling on the City's motion, the District Court held as a matter of law that Deeds had been afforded an individualized assessment, that the City had not denied him employment because of his disability, and that under the case of *Sahai v. Davies*, 557 N.W. 2d 898 (Iowa 1997), UP could not be held liable for discrimination.

Following the District Court's Ruling on Summary Judgment, Deeds appealed.

STATEMENT OF THE FACTS

Plaintiff Nolan Deeds first experienced symptoms of numbness throughout his entire right side on or about December 14, 2011 which continued into January, 2012. (Deeds answer to interrogatory no. 14; App. 112-113); (Mercy Urgent Care Records; App. 138). Dr. Richard Neiman rendered a "probable diagnosis" of Multiple Sclerosis (hereinafter sometimes referred to as "MS" or "RRMS" for Relapsing Remitting

Multiple Sclerosis) for Deeds. (Deeds answer to interrogatory no.14; App. 113); (records of Dr. Neiman; App. 145; 147). In April, 2012, Dr. Patrick Hartley evaluated Deeds' fitness for duty as a volunteer firefighter for Coralville and after referring to NFPA 1582, declined to clear Deeds for duty (April 19, 2012 Hartley letter; App. 179). In January, 2013, Deeds experienced an exacerbation of symptoms due to multiple sclerosis including numbness in his feet, the backs of his legs and his buttocks. (Deeds answer to interrogatory no. 14; App. 113); (records of Dr. Neiman in depo ex. Z; App. 155); (record of UIHC Doctor Pedro Gonzalez-Alegre; App. 158). On or about April 29, 2013, Dr. E. Torage Shivapour of Iowa City diagnosed Mr. Deeds with MS. (Work Well records; App. 246).

In the meantime, Deeds had applied for employment as a firefighter with the City of Cedar Rapids on or about July 11, 2012. (Petition, Para. 10; App. 106). Deeds met the minimum requirements to apply for the firefighter position and passed a physical agility test known as the Candidate Physical Ability Test or "CPAT." (Petition, Para. 11; App. 106); (City of Cedar Rapids Position Profile; App. 125-127). In the fall of 2012, Deeds was interviewed by members of the Cedar Rapids Fire Department as well as the City's Civil Service Commission. (Petition, Para. 12; App. 106). Deeds did not did not receive a job offer as a result of his July 2012 application.

(Petition, Para. 13; App. 106); (Fredericks depo. **50**: 8 – 10; App. 279), but he remained on the certified list of eligible candidates for firefighter for one (1) year. (Fredericks depo. **46**: 21 – **47**: 4; App. 280). Then, in July 2013, the Cedar Rapids Fire Department invited Deeds and others on the City's certified list to interview for the position of firefighter. (Fredericks depo. **90**: 19 – **91**: 2; App. 281). Deeds attended an interview with members of the Cedar Rapids Fire Department (Deeds depo. **219**: 12 – **220**: 25; App. 266), during which he did not exhibit any indication of Multiple Sclerosis. (Deeds depo. **241**: 14 – 20; App. 267). Deeds did not receive an offer immediately after that interview (Deeds depo. **218**: 5- 8; App. 266), but on or about July 25, 2013, the Department extended a conditional offer of employment to Deeds which was contingent upon being medically qualified. (Depo. Ex. PP; App. 130); (Fredericks depo. **48**: 24-**49**:2; App. 280).

Deeds completed a health screening through the City's occupational health nurse, Jennifer Motroni, n/k/a Jennifer Stefani, according to protocols dictated by the Municipal Fire and Police Retirement System of Iowa ("MFPRSI") including questionnaires and certain occupational testing. (Stefani Affidavit; App. 291; 294-299). After Deeds completed a MFPRSI questionnaire, Stefani and Deeds conferred about the information, and Stefani wrote notes based upon Deeds' statements to her concerning his

diagnosis of Multiple Sclerosis, including one that Deeds had been diagnosed in 2009. (Stefani Affidavit; App. 291; 295); (Deeds depo. **205**: 1 – 10; App. 268). Deeds also completed a form on which he indicated he experienced symptoms of Multiple Sclerosis in 2010 but he had not experienced any since then. (Stefani Affidavit; App. 292; 298); (Deeds depo. **208**: 8 – 10; **209**: 1 – 22; App. 269). Stefani was the only individual associated with the City to whom Deeds disclosed his diagnosis of Multiple Sclerosis. (Deeds depo. **129**: 21 – 24; App. 275); (Deeds depo **241**: 14-23; App. 241)

Also in connection with Deeds' medical screening, Stefani provided to Deeds a letter to give his treating neurologist, Dr. Shivapour, concerning Deeds' Multiple Sclerosis in relation to a job description for the position of firefighter with the City. (Stefani Affidavit; App. 292; 300). She also gave Deeds a form of report for Deeds to deliver to Dr. Shivapour, which Dr. Shivapour completed, releasing Deeds to work as a firefighter. (Stefani Affidavit; App. 292; 301). This report was eventually included with other records Stefani submitted to St. Luke's Work Well. (Stefani Affidavit; App. 292).

In addition to having Deeds complete certain forms, Stefani conducted two pulmonary function tests as part of the health screening for Deeds.

(Stefani Affidavit; App. 292; 302). The first test revealed scores indicating pulmonary function below normal, and Deeds indicated to Stefani he had run 8 miles the day prior, a fact which Stefani noted on the report. (Stefani Affidavit; App. 292; 302). Stefani later performed a second pulmonary test on Deeds, which was also below normal. (Stefani Affidavit; App. 292; 302). Stefani transmitted all documents associated with Deeds' medical screening to St. Luke's Work Well. (Stefani Affidavit; App. 292).

Stefani's involvement in the health screening was strictly in her role as Occupational Health Nurse, and she did not render any opinion concerning Deeds' medical eligibility or ability to perform the essential functions of a firefighter for the City of Cedar Rapids, Iowa. (Stefani Affidavit; App. 292). At no time (prior to completing her affidavit) did Stefani disclose to any other City employee the medical information she learned in connection with Deeds' health screening. (Stefani Affidavit; App. 293); (Fredericks depo 50:21-51:2; App. 370)

On or about September 4, 2013, Dr. Jeffrey Westpheling, a certified occupational health physician employed by St. Luke's Work Well, conducted a physical exam of Deeds to determine whether he was medically qualified to work as a firefighter for the City. (records of St. Luke's Work Well Clinic; App. 213-214); (Westpheling depo 26:18-20; App. 290; 23:11-

15; App. 287; 24:2-8; App. 287. Dr. Westpheling reviewed the occupational and medical history forms Deeds had completed and Stefani had provided. (Westpheling depo. 24: 2 -22; App. 287). Dr. Westpheling requested the medical records of Dr. Shivapour concerning Deeds due to Deeds' diagnosis of Multiple Sclerosis. (Westpheling depo. 25: 6 -11; App. 287). Deeds obtained those medical records from Dr. Shivapour's office and delivered them to St. Luke's Work Well. (Deeds depo. 184:20 – 185: 12; App. 270); (depo. ex. LL; App. 134); (Westpheling depo. 19:8 – 21; App. 288). Dr. Westpheling reviewed Dr. Shivapour's records to determine the particular type of Multiple Sclerosis with which Deeds had been diagnosed, the date of diagnosis, course of his treatment and progression of the disease in Deeds' particular case. (Westpheling depo. 19: 22 – 20: 1; App. 288). Dr. Shivapour's records included a January 24, 2013 report from colleague Dr. Pedro Gonzalez-Alegre noting that Deeds described a worsening of his gait during the exacerbation which began in December 2012, such that he "wobbles when he walks." (depo. ex. BB; App. 158). In the process of forming his opinion regarding Deeds' medical eligibility for the position of firefighter with the City, Dr. Westpheling referred to the National Fire Protection Association ("NFPA") standard 1582 concerning Multiple Sclerosis. City App. 185 (Westpheling depo. 33: 3-8; App. 33); (Deeds

depo. 179: 17 – 23; App. 271). Dr. Westpheling noted Deeds' symptomatic condition in December 2011 and again in December 2012. (depo. ex. 16; App. 260). He determined that due to the progression of Multiple Scleroses in Deeds, and the essential job functions for a firefighter, he could not determine Deeds was able to safely perform the essential job functions of a firefighter for the City of Cedar Rapids, Iowa. (depo. ex. 16; App. 260). Then Dr. Westpheling prepared a letter dated September 5, 2013 concerning his opinion, but that letter was not released to the City of Cedar Rapids, Iowa. (depo. ex. 16; App. 260). He did, however, order that the records concerning his determination of medical ineligibility be provided to Deeds. (Depo. Ex. 16; App. 215; 216).

Dr. Westpheling has never spoken to anyone in the Cedar Rapids Fire Department about Deeds or otherwise divulged to anyone with the City any of the medical information he obtained in the course of assessing Deeds' ability to perform the essential functions of a firefighter for the City of Cedar Rapids. (Westpheling depo. 28:2 – 29:25; App. 290). On September 6, 2013 St. Luke's Work Well faxed to the City of Cedar Rapids, Iowa its confidential report indicating on Part 2 that Deeds was "disqualified." (Stefani Affidavit; App. 292; 304). At some point, Dr. Westpheling informed Stefani he would not specify the reason because it was personal to

Deeds. (Stefani Affidavit; App. 293). Stefani noted her contact with Dr. Westpheling and his statement that he could not specify a reason for the disqualification. (Stefani Affidavit; App. 293; 304). Although Deeds had provided St. Luke's Work Well with a standard form of release of information, (depo. ex. 16; App. 213-214), Dr. Westpheling did not regard the standard form as authorization to disclose Deeds' condition of Multiple Sclerosis or the basis for his medical disqualification to anyone outside of St. Luke's Work Well. (Westpheling depo. 29: 8 – 25; App. 290). Stefani notified the Cedar Rapids Fire Department either by telephone or email that Deeds had been medically disqualified. (Stefani Affidavit; App. 293). Because she had no information concerning the basis for the medical disqualification, she could not and did not provide any such information to the Fire Department hiring officials. (Stefani Affidavit; App. 293).

Cedar Rapids Fire Chief Mark English makes all hiring decisions for the Cedar Rapids Fire Department. (Interrogatory answers of Chief English; App. 118). Chief English was informed of Deeds' medical ineligibility by one of his subordinates either by phone or electronic mail. (English depo. 66: 3 – 67: 1; App. 277). Without knowing the basis of Dr. Westpheling's decision, Chief English determined the Fire Department should rescind its offer of employment to Deeds and extend a conditional offer of employment

to another candidate. (English depo. **66**: 23 – **68**: 3; App. 277). Cedar Rapids Assistant Fire Chief Curtis Hopper telephoned Deeds to tell him the conditional offer of employment had been rescinded due to the fact that Dr. Westpheling did not consider him medically eligible for the position. (Deeds depo **230**: 22 – **231**: 12; App. 272). After Hopper informed Deeds he had been medically disqualified by a Work Well doctor, the conversation between Hopper and Deeds ended. (Deeds depo. **230**: 23 – 25; App. 272)

At some point, Deeds contacted Stefani about Dr. Westpheling's determination. (Deeds depo. **232**: 17 – 25; App. 272). Deeds recalls that Stefani told him the determination was for Dr. Westpheling to make. (Deeds depo. **233**: 1 – 5; App. 272) and that Stefani had no information about the basis for his medical disqualification. (Deeds depo. **233**: 6 – 10; App. 272). He did not ask Stefani to talk to any doctor about being medically disqualified as a firefighter. (Deeds depo. **240**: 7 – 9; App. 267). Deeds himself contacted Dr. Westpheling and as Deeds recalls, Dr. Westpheling told him he was entitled to a second opinion through MFPRSI. (Deeds depo. **204**: 6 – 12; App. 204). Deeds also received a letter from Dr. Westpheling which in substance was the same as his phone conversation with him. (Deeds depo. **143**: 5-19; App. 273; **144**: 23-**145**:5; App. 273). Deeds did not ask Dr. Westpheling to discuss his medical eligibility with any other doctors.

(Deeds depo. **239**: 22 – **240**: 6; App. 267). Deeds then contacted someone at the MFPRSI office in Iowa City, Iowa and recalls being told that he had no means of appealing the determination through MFPRSI due to the fact that he was not at that time a member of the system. (Deeds depo. **186**:9 – **187**:25; App. 274).

Deeds did not seek a second opinion about his medical eligibility for the Cedar Rapids firefighter job, (Deeds depo. **188**:1- 10; App. 274), nor did he otherwise seek a reconsideration of Chief English's decision to rescind his conditional offer of employment. (Deeds depo. **240**: 10 – 13; App. 267). At no time did Deeds request accommodation from the City of Cedar Rapids for a disability. (Deeds depo. **238**: 23 – **239**: 4; App. 267).

ARGUMENT

I. THE DISTRICT COURT WAS CORRECT IN HOLDING THAT THE CITY'S DECISION TO RESCIND PLAINTIFF'S EMPLOYMENT OFFER WAS NOT MOTIVATED BY HIS DISABILITY²

STATEMENT REGARDING PRESERVATION OF ERROR

As to the City, the sole issue presented for review is whether the District Court erred in holding that the City's decision to rescind [Deeds'] employment offer was not motivated by his disability. The City agrees that Deeds has preserved that issue for review.

STATEMENT REGARDING SCOPE AND STANDARD OF REVIEW

The City concurs with the substance of Deeds' statements regarding the proper scope and standard of review in this case.

A. IOWA CODE CHAPTER 216 PROHIBITS EMPLOYMENT DISCRIMINATION "BECAUSE OF" DISABILITY

As it pertains to the case at bar, Iowa Code Chapter 216 prohibits employment discrimination because of an applicant's disability. The undisputed facts of this case establish that the City did not violate Iowa Code

² On appeal, Deeds specifies as error that "The District Court erred in finding the City's decision to rescind [Deeds'] employment offer was not motivated by his disability." This specification goes to the District Court's ruling in favor of the City and is set forth as Division I of his arguments. He has created subdivisions or subsections A. and B. There is extensive overlap or interplay between those parts, however, and in some instances, the City is unable to discern how Deeds organized his arguments according to the headings for subdivisions A. and B. Accordingly, the City respectfully did not structure its arguments in precisely the same manner. However, the City has still endeavored to address everything in subdivisions A and B of Deeds' brief.

Chapter 216 (the Iowa Civil Rights Act or “ICRA”). In pertinent part, ICRA provides:

216.6 Unfair employment practices.

1. It shall be an unfair or discriminatory practice for any:

a. Person to refuse to hire, accept, register, classify, or refer for employment, to discharge any employee, or to otherwise discriminate in employment against any applicant for employment or any employee because of the age, race, creed, color, sex, sexual orientation, gender identity, national origin, religion, or disability of such applicant or employee, unless based upon the nature of the occupation. If a person with a disability is qualified to perform a particular occupation, by reason of training or experience, the nature of that occupation shall not be the basis for exception to the unfair or discriminating practices prohibited by this subsection.

Iowa Code §216.6(1)(a)(emphasis supplied). Where, as here, there is no direct evidence of impermissible discrimination under ICRA, a plaintiff must make a *prima facie* showing that she or he: (1) has a disability within the meaning of ICRA; (2) is qualified to perform the essential functions of the job in question either with or without reasonable accommodation and (3) suffered an adverse employment action *because of* her or his disability.

Peterson v. Martin Marietta Materials, Inc., 2016 U.S. Dist. LEXIS 64469 (N.D. Iowa May 17, 2016)(emphasis supplied; citing *Hansen v. Seabee, Corp.*, 688 N.W.2d 234, 238 (Iowa 2004) (analyzing ADA claim and citing *Kincaid v. City of Omaha*, 378 F.3d 799, 804 (8th Cir. 2004)); *Casey's Gen. Stores*, 661 N.W.2d at 519-20 (stating identical elements of ICRA disability

discrimination claim). When analyzing a disability claim under Iowa Code Chapter 216, Iowa courts may and often do refer to the Americans with Disabilities Act, 42 U.S.C.S. § 12101 et seq., its regulatory interpretations, and case law. *Fuller v. Iowa Dep't of Human Servs.*, 576 N.W.2d 324, 329 (Iowa 1998). See also, *Meier v. Family Dollar Servs.*, 443 F. Supp. 2d 1036 (N.D. Iowa 2006)(at footnote 6).

As the District Court noted, Deeds never expressly articulated whether his claim was one of disparate treatment or disparate impact, but the Court construed Deeds' claims as being disparate treatment due to the fact Deeds was not "challenging the City's medical screening requirement or any other policy." (Summary Judgment Ruling, App. 850 at fn. 7). On appeal, Deeds argues the City's discrimination was not the series of examinations or releases required of him, only that the City failed to hire him "based on his MS." Appellant's Proof Brief at p. 15. Because Deeds is claiming disparate treatment, he must prove the City's subjective intent was to discriminate against him on the basis of his disability. *Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n*, 453 N.W.2d 512, 516 (Iowa 1990)(citing

International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335, n. 15)(1997)).³

“Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Kolarik v. Cory Intern. Corp.*, 721 N.W.2d 159, 162 (Iowa 2006). “A factual dispute is material only if the dispute is over facts that might affect the outcome of the suit.” *Estate of Harris v. Papa John’s Pizza*, 679 N.W.2d 673, 777 (Iowa 2004). Employment discrimination cases may properly be decided on summary judgment. *Wynngarden v. State Judicial Branch*, No. 13-0863, 2014 Iowa App. LEXIS 857, at *1-17 (Iowa Ct. App. Aug. 27, 2014) (citing *Torlowei v. Target*, 401 F. 3d 933, 935 (8th Cir. 2005). When viewed in the light most favorable to Deeds, the undisputed record evidence establishes definitively that (a) no one with hiring authority for the City was even aware Deeds had any disability until well after Chief English made the decision to rescind the conditional offer of employment and (b) no one with hiring authority for the City knew until after Deeds made his claims against the City on what basis Dr. Westpheling formed his independent medical

³ Even to the extent, if any, that Deeds’ claims may be construed on appeal as disparate impact claims, those claims must fail. The Iowa Civil Rights Act and regulations promulgated pursuant thereto recognize that a disability may properly form the basis for a refusal to hire where the nature of the occupation is taken into account. Iowa Code §216.6(1), *supra*. This principle is at the heart of an undisputed need for medical screenings and medical examinations in hiring firefighters. There is no evidence that the City’s practice of medically qualifying applicants for firefighter positions falls more harshly on one group than another. Nor is there any evidence it is not justified by business necessity. In any event, Deeds has never made any such claims.

opinion that Deeds would not be able to safely perform the essential job functions of a firefighter.⁴ To be clear, Deeds doesn't dispute these facts. Instead, he asks the Court to draw conclusions of law which are unsupported by applicable authority and contrary to logic and public policy.

**B. THE CITY DID NOT BASE ITS DECISION TO RESCIND
ITS EMPLOYMENT OFFER TO DEEDS ON DISABILITY
OR ACT WITH DISCRIMINATORY MOTIVE**

In granting the City's Motion for Summary Judgment, the District Court held the City did not rescind its offer of employment to Deeds because of a disability, but rather because he was not medically qualified according to the physician whose duty it was to make that independent determination. Citing *Boelman v. Manson State Park*, 522 N.W.2d 73, 80 (Iowa 1994) and *Annear v. State*, 454 N.W.2d 869, 875 (N.D. Iowa 1995), the court below held that the Iowa Civil Rights Act does not require employers to hire an individual if that individual is unable to perform the essential job duties due to a disability; it requires only that employers hire an individual if that individual can perform those duties in spite of a disability. (Summary Judgment Ruling, App. 849). In this case, a duly qualified, independent occupational health doctor determined that Deeds

⁴ The City contends Deeds could not have safely performed the essential job functions of a firefighter at the time of the job offer in question, such that he fails as a matter of law on the second of the three elements of an ICRA claim. In ruling on the City's motion for summary judgment, however, the District Court found Deeds had put forth a fact question on his ability to perform firefighting duties, and the City did not cross appeal that point.

could not perform the essential duties of a firefighter and as such, the City was not required to hire him, even, as the District Court put it, under the most liberal reading of Iowa Code Chapter 216. By comparison, Deeds urges on appeal that the mere existence of symptoms means there is necessarily an underlying disability, so that when an employer fails to hire due to a medical opinion that those symptoms would render him unable to perform the job duties, the employer's decision is *per se* because of the disability, and *per se* discriminatory. Deeds' position is contrary to established law and sound reason.

The District Court also found Deeds had failed to generate a genuine issue of material fact concerning the existence of a discriminatory motive or intent on the City's part. (Summary Judgment Ruling, App. 848-850). In finding as a matter of law that the City had no such motive or intent, the court below pointed out that Deeds offered no relevant evidence on that issue. The Court rejected Deeds' reliance on the fact Dr. Westpheling referred to NFPA standards in addition to the MFPRSI guidelines. On appeal, Deeds again asserts that Dr. Westpheling's reliance on the NFPA "evidences" discriminatory motive. In analyzing this argument below, the District Court cited Dr. Westpheling's deposition testimony, as follows:

Q: Why did you apply NFPA 1582 to Mr. Deeds' case?

A: In cases where there is a question on whether or not an applicant can perform the essential duties of firefighter, the first standard to look at is the MFPRSI guidelines as set forth in the protocol. If it's not something that's expressed in the protocol, then one has to go to the next best available guidance, and in this case it would be the NFPA 1582 which is a consensus opinion of expert panels including fire chiefs, fire service members, physicians, specialists in the areas of recommendations. That in my mind is the next best available source to look at, and so that's why I consulted the NFPA 1592 and have done so numerous times in the past and since. It's continually updated with new findings and new recommendations as well.

(Summary Judgment Ruling, App. 836-837; 850). Noting there is no evidence contradicting Dr. Westpheling's explanation of his intent or motivation for referring to NFPA, the Court held Dr. Westpheling's reference to those standards does not evince a discriminatory intent but rather the lack of such intent. Thus, even if Dr. Westpheling's use of NFPA standards is imputed to the City, it is not evidence of improper intent or motive on the part of the City.

Similarly, the District Court rejected Deeds' contention that by imputing to the City Dr. Westpheling's knowledge of Deeds' disability (as distinguished from imputing his reference to NFPA 1582), Deeds could prove the City had discriminatory intent or motive. (Summary Judgment Ruling, App. 850). On appeal, Deeds again maintains that knowledge of his RRMS should be imputed to City officials who made the decision to rescind his conditional offer of employment and that this imputed knowledge

supports the inference the City rescinded Deeds job offer because of disability. This argument raises no genuine issues of material fact, and it fails as a matter of law. Even if the knowledge of Dr. Westpheling or Stefani were imputed to the City's hiring officials in the fire department, Deeds couldn't satisfy the requisite showing that the hiring officials had the requisite motive or intent. *Goodpaster v. Schwan's Home Serv., Inc.* 849 NW.2d 1 (Iowa 2014). By definition, imputed knowledge is not the same as actual knowledge. In *Goodpaster*, unlike here, summary judgment was denied because there was evidence that those who made personnel decisions actually knew of the employee's need for accommodations for health reasons. Nothing in Iowa Code §216.6 or the regulations and cases thereunder supports Deed's theory that imputed knowledge gives rise to a disability claim. Imputed knowledge could not have motivated or otherwise played a part in Chief English's decision to revoke the conditional offer of employment. As noted by one federal judge quoting another, it “defies logic to argue that the [decision maker's] ‘real intention’ was to fire [the employee] ‘because of a disability the [decision maker] ‘knew nothing about.’” *Huisinga v. Federal-Mogul Ignition, Co.* 519 F. Supp. 2d 929, 954 (S.D. Iowa 2007)(quoting *Cordoba v. Dillard's, Inc.*, 419 F.3d 1169, 1183 (11th Cir. 2005).

In this case, no one involved in the hiring process was even aware until well after the offer was rescinded that Deeds had been diagnosed with RRMS, let alone whether or when he had experienced symptoms of RRMS. *Ipso facto*, the City cannot have discriminated against him on the basis of disability unknown to the hiring officials. *Raytheon Co. v. Hernandez*, 540 U.S. 44, 54, at footnote 7 (2003)(holding where defendant lacked knowledge of disability, hiring decision could not have been based even in part on that disability). The single City employee who knew Deeds had been diagnosed with Multiple Sclerosis,⁵ occupational health nurse Stefani, had no role in deciding who would be hired by the City, and it is uncontroverted that she never told anyone involved in that process. Indeed, the hiring officials affirmatively testified to that effect. Deeds does not contend otherwise. At least as importantly, if not more so, it is undisputed that no one at the City, not even Nurse Stefani, knew why Dr. Westpheling decided that Deeds was not medically qualified for the position of firefighter with the City. Dr. Westpheling in fact made it a point to keep the reason confidential unless Deeds told him to do otherwise. Meanwhile, Deeds has conceded that he

⁵ The record reflects that Deeds twice gave a date for his diagnosis that was earlier than the actual diagnosis. This is reflected in the Statement of Facts accompanying the Motion for Summary Judgment, exhibits attached to the Affidavit of Jennifer Stefani, Deeds' deposition testimony and medical records. Once, he disclosed to a Health and Safety Nurse that he had first been diagnosed in 2009, and then he disclosed it was in 2010. The actual date of his original diagnosis was either December, 2011 or January, 2012. Moreover, Deeds affirmatively stated that he had no additional symptoms other than the initial occurrence, when in fact he had experienced an exacerbation in January, 2013, just about nine months prior to being examined by Dr. Westpheling.

knew the reason for his disqualification and never asked or authorized any disclosure after learning of it. Once Deeds knew he had been medically disqualified on the basis of NFPA, he could easily have made known to Dr. Westpheling, another doctor, or Chief English his opinion that in spite of his diagnosis, he could safely perform the essential job functions of firefighter either with or without accommodation. But he did not, and the City moved to hire another individual without ever knowing the reason Deeds did not obtain medical clearance. It is certainly Deeds' prerogative *not* to share his personal medical information with anyone. But he should not be permitted to claim the City discriminated against him on the basis of the disability which he himself chose to keep private from those who made the hiring decision.

The fact the City's hiring officials lacked knowledge of Deeds' RRMS diagnosis is corroborated by its process for post-offer medical screening and examination. That protocol allows only occupational health professionals access to an applicant's confidential healthcare information. That process was followed in Deeds' case. Dr. Westpheling would not share information concerning Deeds' medical examination except for his determination that Deeds was ineligible. Even when asked by Occupational Nurse Stefani, he would not divulge the information without Deeds' express

authorization to do so. Moreover, Deeds himself chose not to provide his diagnosis and medical history to anyone other than Nurse Stefani and Dr. Westpheling. The degree of confidentiality which Dr. Westpheling attached to Deeds' medical information should not be held against the City, particularly where Deeds himself did not disclose it. In fact, as this case makes clear, the Fire Department's isolation from a candidate's medical history is very important. First, and foremost, it preserves the confidentiality of Deeds' medical information under applicable law. Just as importantly, the confidentiality of an applicant's medical history prevents City officials with no medical expertise from allowing the existence of a disability to influence hiring decisions, subconsciously or otherwise, wittingly or unwittingly. As Chief English testified, the Fire Department relies on its occupational health doctors to properly assess whether a firefighter candidate is medically capable of performing the essential job functions precisely.

Thus, as far as anyone in the City knew could have known, Deeds may have been deemed medically ineligible for some condition that is not a disability. Iowa law is clear that not every medical condition constitutes a disability within the meaning of the ADA or ICRA. See, for example, *Tusing v. Des Moines Indep. Cmty. Sch. Dist.*, 639 F.3d 507, 512 (8th Cir.

Iowa 2011)(holding depression did not constitute a "disability" within the meaning of ICRA or the ADA); *Jackson v. Bossard IIP, Inc.*, No. 6-437 / 05-1883, 2006 Iowa App. LEXIS 1290, at *2-7 (Iowa Ct. App. Nov. 16, 2006) (holding employee's narcolepsy not a disability for purposes of ICRA); *Smith v. Creston Mun. Utils./Water Dept.*, No. 0-581 / 10-0181, 2010 Iowa App. LEXIS 1419, at *1-16 (Iowa Ct. App. Nov. 24, 2010).

C. THE CITY RESCINDED ITS EMPLOYMENT OFFER TO DEEDS BECAUSE HE LACKED PROPER MEDICAL QUALIFICATION BY AN INDEPENDENT OCCUPATIONAL HEALTH PHYSICIAN

At its core, the decision to revoke Deeds' conditional employment offer was based not on a disability, but rather on the fact that Deeds lacked medical qualification. The City concurs that Deeds' lack of medical qualification is a consequence of his disability. *Roberts v. City of Chicago*, 817 F.3d 561, 566 (7th Cir. 2016)(finding no discrimination under ADA where, as a consequence of a disability, plaintiffs' failed a medical screening). The job of firefighter, however, requires medical clearance, much like a truck driver must have a particular type of driver's license to be eligible for certain employment positions. There is no dispute in this regard. The pertinent point is that for reasons unknown to the City, Dr. Westpheling did not qualify Deeds medically to work as a firefighter at that time. This left Deeds without the prerequisite medical clearance and the Chief could

not hire Deeds because of that fact alone. Deeds has failed to establish a genuine issue regarding a discriminatory motive on the City's part.

Deeds attempts to distinguish *Roberts v. City of Chicago*, 817 F.3d 561, 566 (7th Cir. 2016), by arguing the *Roberts* Plaintiffs never claimed they were denied employment because of their disabilities and also that they were never medically disqualified while Deeds was. First, Deeds is simply wrong in stating that the *Roberts* plaintiffs weren't making a disability discrimination claim. Second, Deeds makes a distinction without a difference. For purposes of legal analysis, both cases involve a lack of medical clearance which precluded employment and in both cases, it is claimed that the disability was the underlying reason. Deeds misses the very point of the *Roberts* case: the lack of medical clearance is a valid reason for denying employment even if it can ultimately be traced to a disability. On a distinct but related note, the *Roberts* case also points up the fact that as far as the City knew, Deeds could have been denied medical clearance because he didn't show up for the appointment.

Deeds doesn't dispute the need for such a clearance as a prerequisite for being a firefighter. The gist of Deeds' argument, then, seems to be that the City cannot satisfy its legal obligation under Iowa Code Chapter 216 unless it dictates how a fitness for duty exam is conducted or pries into the

medical professional's reasoning and the applicant's personal medical information. The law does not support any such duty. Regardless of Deeds' assertion that the City is being disingenuous, the City's position remains that hiring officials do not need to know the basis on which qualified medical professionals make the fit for duty determination and, in fact, they should not try to find out. As both Chief English and Dr. Westpheling testified, fire department officials lack the expertise necessary to make proper use of confidential medical information. There is nothing disingenuous about respecting the confidentiality of a job applicant's personal medical information. This doesn't mean the City is trying to bury its head in the sand; it means the City is ensuring that an applicant isn't denied employment on the basis of a disability.

Deeds' RRMS caused active symptoms less than nine months prior to his medical examination with Dr. Westpheling. But it was not the disability *per se* that rendered Deeds medically ineligible. Rather, it was the course of the disease and the recency of his personal relapse which Dr. Westpheling determined, in his independent medical opinion, precluded medical clearance for Deeds. If Deeds had not experienced such a recent relapse, he may well have obtained medical clearance (assuming no other disqualifying conditions existed). While the City does not purport to speak for Dr.

Westpheling or Unity Point, the record is clear that Dr. Westpheling relied on Deeds' personal medical history, as reflected in medical records about the specific course of RRMS manifested in Deeds the individual, the preliminary testing by the City's occupational health nurse, and his knowledge of and personal experience performing the essential job functions of a firefighter. He did not place greater emphasis on NFPA 1582 than these other factors. The City's preliminary testing was also individualized to Deeds regardless of his diagnosis. First Deeds' individual physical abilities were tested by the CPAT, which he passed. Next, Stefani conducted testing of Deeds to measure in objective terms certain of Deeds' individual physical capacities. Although Stefani did not have authority to deem Deeds medically eligible or ineligible, the results of this individualized testing were included as part of the information Dr. Westpheling considered in his evaluation. In addition to that information, Dr. Westpheling conducted his own physical examination of Deeds and considered the progression of the disease in Deeds the individual, by reviewing Deeds' personal medical history and taking into account the fact Deeds had twice experienced symptoms of MS within the preceding three years, the more recent occurrence being the preceding December, or approximately nine months before his exam. Dr. Westpheling's review included records from Dr.

Shivapour which in turn included records of Dr. Pedro Gonzales-Alegre.

Dr. Westpheling also evaluated Deeds with specific reference to the essential job functions of a firefighter. Thus, not even Dr. Westpheling based his determination on Deeds' diagnosis *per se*. Rather, the but-for cause of being medically disqualified was not the diagnosis; it was the fact that Deeds had experienced a relapse just nine months prior to his examination, with symptoms that would have impaired his ability to perform the essential functions of the position. To the extent Deeds complains of Dr.

Westpheling's assessment of the risk that Deeds' symptoms might relapse, the complaint fails. There is necessarily a prospective element in assessing any individual's fitness to perform a given job. NFPA 1582 is not unique in that regard, nor is it a blanket exclusion from firefighting for those who have an MS diagnosis, as Deeds characterizes it. By its terms, the scope of NFPA 1582's guidance on RRMS is limited to three years post-relapse. Moreover, neither NFPA 1582 nor Dr. Westpheling could have precluded Deeds from seeking reasonable accommodation. If Deeds sought an accommodation, the City could at least have explored with Deeds the possibility he could safely perform the essential job functions in spite of NFPA 1582. Arguably, Deeds' characterization of NFPA1582 as a blanket exclusion of employment

has as much to do with his failure to seek accommodation as it does with the standard itself.

Deeds further theorizes the City should be liable for Dr.

Westpheling's allegedly improper conduct (i.e., not clearing Deeds to work as a firefighter) because Work Well, and by extension Dr. Westpheling, acted as the City's agent. Deeds' agency theory also presupposes Dr.

Westpheling's conduct was improper. First, as set out elsewhere in this Brief and by UP, Dr. Westpheling's examination of Deeds' ability to safely perform the essential job functions of a firefighter constituted an individualized assessment within the meaning of ICRA. The District Court agreed, finding at page 14 of the Ruling that Deeds was afforded an individualized assessment as a matter of law. Second, Deeds' agency theory and his citation to the Restatement Third fail because Dr. Westpheling was not the City's agent, but rather an independent medical professional. Deeds does not even contend Dr. Westpheling was under the direction or control of the City and, as affirmatively set out more fully in the Statements of Fact, he exercised his own medical judgment. *Sahai v. Davies*, 557 N.W. 2d 898, 901 (Iowa 1997). None of the other cases Deeds cites are supportive of his agency theory either. Both *Holiday v. City of Chattanooga*, 206 F. 3d 637 (6th Cir. 2000) and *Garrison v. Baker Hughes Oilfield Operations, Inc.*, 287

F.3d 955 (10th Cir. 2002) are inapposite for the reason that the employers in those cases were aware the plaintiff had a disability. Neither does Deeds get support from *Kimbrow v. Atlantic Richfield Co.*, 889 F.2d 869, 876 (9th Cir. 1989), or *Wirey v. Richland Comm. College*, 913 F.Supp. 2d 633, 644 (C.D. Ill. 2012). Those cases involved other employees of the defendant who actually knew about the medical condition in question, whereas Dr. Westpheling is not a City employee. The other employee in *Kimbrow* supervised the individual with the disability and was not an individual charged under federal law with keeping medical information confidential, as was Dr. Westpheling. Additionally, the *Kimbrow* case has been criticized by the Northern District of Iowa as unpersuasive. *Huisinga v. Federal-Mogul Ignition, Co.* 519 F. Supp. 2d 929, 954 (S.D. Iowa 2007). The employees in question in the *Wirey* case were successor individuals in the same position, and both were fellow employees of the plaintiff in that case, not medical professionals with the legal obligations of confidentiality. In fact, the *Wirey* case is directly supportive of the City's position, not Deeds'; the court there held the Plaintiff had not shown the adverse employment decision was based on disability, citing the ADA's language forbidding an adverse employment action "because of" the disability, but not one that occurs "in spite of" the disability. *Wirey*, 913 F. Supp. 2d at 643 (HN 11).

Deeds also cites *EEOC v. American Tool & Mold Inc.*, 21 F.Supp. 3d 1268, 1284 (M.D. Fla. 2014), for the proposition that an employer cannot “blindly” rely on a medical provider’s opinion where the “examination could not have been, as a matter of law or logic, an individualized assessment that accounted for the essential functions of the position.” But that case is nothing like the case at bar. The examination in *American Tool & Mold* was not conducted with reference to job descriptions from the employer. *Bates v. Dura Auto Sys., Inc.*, 767 F.3d 566 (6th Cir 2014) involved a third party vendor which provided otherwise confidential medical information to the employer, a fact which is also clearly not present in this case.

Deeds argues that because NFPA standards are not required by the Medical Examination Protocols of the Municipal Fire and Police Retirement System, it was illegal for Dr. Westpheling to refer to them. The fact that reference to NFPA is not required by MFPRSI, however, does not mean it was prohibited or improper in any respect. Moreover, the District Court’s reference to Iowa Code §400.8A is of no consequence to the disposition in this case. The Court’s decision did not turn on that reference or to the code section itself. Nothing in Iowa Code §400.8, the section Deeds urges as the correct one for purposes of this case, prohibits reference to NFPA 1582. As Dr. Westpheling put it, where an issue is not expressed in MFPRSI

protocols, it is proper to seek guidance elsewhere and NFPA 1582 was the next best medical guidance because it is a regularly updated consensus opinion of expert panels including fire chiefs, fire service members, physicians, specialists in the areas of recommendations. Because it was Dr. Westpheling and Dr. Westpheling alone who chose to refer to NFPA, it is immaterial to this case that the City has not formally adopted NFPA. Indeed, the City relied on Dr. Westpheling to use his medical expertise and to bring to bear such medical knowledge as he, Dr. Westpheling, deemed proper. The City did not direct Dr. Westpheling to refer to NFPA, and Deeds does not contend otherwise. As a matter of public policy, the City acted appropriately by not interfering with Dr. Westpheling's methods. Employers should not attempt to influence the judgment or opinions of an independent medical practitioner.

Finally, Deeds' citation to the MFPRSI Directive dated February 10, 2016 does not make Dr. Westpheling's reference to NFPA illegal or discriminatory. First, the memo is dated well after the events forming the basis for Deeds' allegations. Second, the memo says only that an individual may not automatically be disqualified from a position based on a certain diagnosis or medical history without having a case-by-case evaluation of abilities to perform without posing a direct threat to self or others. Again,

the undisputed record evidence establishes, and the District Court held as a matter of law, that Deeds was given an individualized assessment.

**II. THE DISTRICT COURT WAS CORRECT IN FINDING
THE UNITY POINT DEFENDANTS DID NOT AID AND
ABET DISABILITY DISCRIMINATION**

This specification of error by Deeds is directed to the Unity Point Defendants. Insofar as the City contends it did not engage in disability discrimination, however, the City contends the District Court was correct in finding the Unity Point Defendants did not aid and (or) abet disability discrimination. In all other respects, the City waives its brief as to this Division of Deeds' Brief.

CONCLUSION

Defendant Appellee City of Cedar Rapids respectfully urges this Court to affirm in all respects the September 21, 2016 Ruling by the Honorable District Court Judge Paul Miller, and further, requests that all costs be assessed to Plaintiff Appellant Nolan Deeds as allowed by law.

REQUEST FOR NONORAL SUBMISSION

The City does not believe oral argument is necessary but, in the event the Court deems it necessary to schedule oral argument in this matter, the City asks to be heard at that oral argument.

Respectfully submitted,

/s/ Elizabeth D. Jacobi

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ATTORNEY'S COST CERTIFICATE

I, Elizabeth D. Jacobi, certify that there was no cost to reproduce copies of the preceding Appellee's Final Brief because the appeal is being filed exclusively in the Appellate Courts' EDMS system.

Certified by: /s/ Elizabeth D. Jacobi

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Certified by: /s/ Elizabeth D. Jacobi

CERTIFICATE OF SERVICE AND FILING

I, Wendy E. Howard, hereby certify that on the 6th day of March, 2017, I electronically filed the foregoing Final Reply Brief with the Clerk of the Iowa Supreme Court by using the EDMS system. Service on all parties will be accomplished through EDMS.

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